FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 161

NATIONAL METROPOLITAN BANK, A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

BRIEF OF PETITIONER

GEORGE C. GERTMAN,
American Security Building,
Washington, D. C.

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I

The Opinions of the Courts Below

The judgment of the District Court of the United States for the District of Columbia (R. 19) was entered without an opinion.

The opinion of the United States Court of Appeals for the District of Columbia, affirming the judgment of the District Court, was reported in 142 F. (2) 474, and is a part of the record (R. 25-29).

II

Jurisdiction

The jurisdiction of this Court is invoked by reason of its jurisdiction to review decisions of the United States Court

of Appeals for the District of Columbia under Title 28, U. S. C. A., s. 347 (Judicial Code, s. 240, amended).

III

Statement of the Case

Between July 13, 1936, and November 16, 1938—2⅓ years—the Paymasters of the United States Marine Corps, Washington, D. C., issued 144 Treasury checks totalling $18,060.83 drawn payable to the order of sixteen marine officers, as follows:

8 to Lieutenant Colonel C. B. Cates
15 to Captain C. R. Wallace
23 to Captain H. M. Peter
22 to Major B. Dubel
12 to Lieutenant Colonel F. A. Hart
33 to Captain E. W. Snedecker
7 to Lieutenant Colonel W. W. Ashurst
9 to Major R. H. Pepper
1 to Captain T. B. Jordan
1 to Captain A. J. Cincotta
2 to Captain J. H. Berry, Junior
2 to Captain H. S. Wheeler
3 to Captain V. W. Worledge
3 to First Lieutenant James A. Hennesy
1 to Captain F. C. Donald
2 to First Lieutenant G. A. Brace

Most of these officers were attached to the Marine Corps Headquarters, Washington, D. C.

In validating and issuing them, the Paymasters believed that the checks were in payment of legitimate debts owing the payees for the object stated on them, but in November 1938, they learned that they were issued in payment of forged and fictitious claims fabricated by James H. Foley,

a civilian clerk in the Paymasters' Department. As a result of this, the Government had sustained a loss of $18,060.83.

As the checks were conceived in fraud and therefore fraudulently issued, it followed as a corollary that they would bear false endorsements since checks fraudulently obtained are always fraudulently used.

To recoup this loss, the Government, four years afterwards, filed the present suit on the theory that since petitioner had stamped the checks, "Pay to the order of any Bank, Banker or Trust Co. Prior endorsements guaranteed," it should make good what the Government had lost.

Petitioner admitted receiving the money but denied responsibility for the loss on the ground that it had acted throughout upon its faith in the integrity of the checks and in the belief that they were in all respects what they imported, namely, checks issued the payees in payment of the debts owing them as recited on their face. Petitioner also stated that it had been innocently drawn into the transactions, that it acted throughout the years in good faith, that it paid out the money as it was received, that it was not enriched in any way, that it never cashed the checks for the forger, and that since the checks were fraudulent and duplicitas, the loss should remain where it fell (R. 8-18).

On March 22, 1943, the Government filed a motion for judgment on the pleadings (R. 19). On June 9, 1943, the District Court granted the motion and entered judgment against petitioner for $18,060.83, with interest from August 11, 1942 (R. 19-20).

On June 15, 1943, petitioner noted an appeal from the judgment to the United States Court of Appeals for the District of Columbia (R. 20) and superseded the judgment by depositing $22,000.00 in the Registry of the Court (R. 20). Petitioner filed a statement of the points on which it relied on its appeal (R. 21-23).

On May 1, 1944, the United States Court of Appeals for the District of Columbia rendered its opinion (R. 25-29) and affirmed the judgment of the District Court (R. 30).

On June 14, 1944, petitioner filed in this Court a petition for writ of certiorari which was granted on October 9, 1944 (R. 31).

IV

Specifications of Error

The United States Court of Appeals for the District of Columbia erred—

1. In affirming the judgment of the District Court.

2. In failing to rule that petitioner's innocence of wrong, freedom from negligence, absence of unjust enrichment, and its good faith throughout the years, constituted a complete defense to recovery.

3. In failing to rule that the United States was precluded from setting up the forged endorsements as the basis of recovery.

4. In failing to differentiate between valid Government checks issued conformably to law and false Government checks issued in contravention of law.

5. In ruling that when petitioner presented the false checks for payment with a warranty, express or implied, that the payees' endorsements were regular in all respects, it thereby made itself liable to the drawer or drawee if it afterward was shown that they were forged.

6. In ruling that the right of recovery is absolute and therefore equitable considerations are irrelevant.

7. In ruling that petitioner, as holder, was under a statutory duty to determine the genuineness of the payees' endorsements and that it acted at its peril.

8. In ruling that the petitioner's guaranty added something additional to its quasi contractual obligation to return the money if it were found against equity and good conscience to keep it.

9. In failing to rule that the Government was under a duty to make such examination of its records and files, as was made in November 1938, as would timely detect the fraudulent issuance of the first check and thereby prevent the issuance of a succession of checks in violation of law.

10. In failing to rule that no valid contract, quasi or otherwise, available to the Government as drawer-drawee, can be founded on false Government checks.

V

Summary of Argument

1. The action is founded on the assumption that the checks were valid, i. e., issued conformably to statutory law, but it stands admitted that they were false, i. e., issued in contravention of statutory law.

2. Petitioner stands before the Court free of wrongdoing, free of negligence and free of unjust enrichment.

3. The action is ruled throughout by equitable considerations and since it has not been shown that petitioner cannot retain the money with good conscience, there can be no recovery. *United States* v. *Chase National Bank*, 252 U. S. 485; *United States* v. *First National Bank of Chicago*, 138 F. (2) 681; Keener (1935) on Quasi Contracts, pp. 43, 67.

4. The Government being at fault in issuing checks in contravention of law, the equities of the Government are not superior to those of petitioner. *United States* v. *Chase National Bank*, *supra*.

5. The checks being false and therefore not susceptible of valid endorsements, the endorsements are of the same sufficiency in law as they would be if all were genuine. *United States* v. *Guaranty Trust Company*, 60 F. (2) 799, 802.

6. The admitted facts set up in the answer preclude the Government from asserting the forged endorsements as a basis of recovery. 28 D. C. Code (1940), s. 124.

7. Though the distinction is well recognized, the United States Court of Appeals for the District of Columbia did not distinguish between obligations of an endorser arising out of the payment of valid Government checks and those arising out of the payment of false Government checks. *United States* v. *Chase National Bank*, *supra*; *United States* v. *Chase National Bank*, 241 F. 535, 538.

8. Loss on a valid Government check springs from the forged endorsement while loss on a false Government check springs from its issuance. One is real, the other counterfeit.

9. It is no longer on open *Federal* question that a guaranty written above an endorsement on a valid Government check adds nothing to the normal obligation of the endorser who presents the check for payment to the drawer-drawee. *United States* v. *Guaranty Trust Company*, 293 U. S. 340, 349.

10. Even if such guaranty does enlarge the endorser's obligation on a valid Government check, it cannot be availed of by the Government where the check was issued by it in contravention of statutory law. *Tandy* v. *Elmore-Cooper Live Stock Commission Company*, 113 Mo. App. 409, 87 S. W. 614; *Johnson* v. *Hullings*, 103 Pa. 498.

VI

Argument

1. Between July 13, 1936 and November 16, 1938, The Anacostia Bank forwarded to petitioner 144 apparently valid Treasury checks for collection to its account; they having been cashed or deposited at that Bank by James H. Foley, bearing what purported to be the payees' genuine endorsements.

Foley was a civilian clerk, CAF-4, in the Paymaster's Office of the United States Marine Corps, Washington, D. C., whose duties were required to be performed "under general administrative supervision," 5 U. S. C. A., s. 673, p. 275. Compare 20 Decisions of Comptroller of Treasury, 859.

As "it is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, * * *," *Lewis* v. *United States*, 279 U. S. 63, 73, petitioner assumed that the checks were valid "as public funds cannot be expended except through the means of a draft or Treasury warrant," 31 U. S. C. A., s. 492.

In appearance the checks were valid as each stated the object for which it was issued as the law required, namely, "pay" or "mileage," and they had typed on them the name and rank of the sixteen payee marine officers to whom, presumably, they had been issued. Most of these marine officers were actually stationed at Marine Corps Headquarters, Washington, D. C., whence the checks originated, and therefore their signatures were always available for comparison. There was nothing suspicious about the checks to suggest that they were not what they imported, i.e., valid Government checks issued conformably to law in

payment of legitimate obligations of the United States. Photostats of the checks are filed in the Clerk's Office.

Government checks differ from private checks in that public funds can be expended only in compliance with statutory law and in banking circles they pass virtually on the basis of currency. Consequently, the normal banking risk which attends a valid Government check is only the chance of its being stolen or lost by the payee, abstracted from the mail, or otherwise fall into a forger's hands. Examples of this are found in *Clearfield Trust Company* v. *United States*, 318 U. S. 363, and *United States* v. *Guaranty Trust Company*, 293 U. S. 340. But inasmuch as false Government checks beget false endorsements, it follows that a Government check unlawfully issued will be unlawfully used. An example of this is found in *United States* v. *Chase National Bank*, 252 U. S. 485.

Upon presenting these apparently valid checks to the Government as drawer-drawee for payment, petitioner stamped them, "Pay to the order of any Bank, Banker or Trust Company. Prior Endorsements guaranteed." Admittedly, this was done *solely* in reliance upon the integrity of the checks, the genuineness of which the Government had inherently warranted, and in the belief that the payees' signatures were true (R. 7).

Petitioner did not keep, but paid over to The Anacostia Bank, the proceeds of each check as collected throughout the 2½ years. It made no charge, was not benefited and stands free of negligence. After the checks had run their course as valid checks and had been redeemed at the Treasury as such, the Government in November 1938 found out that they had been issued in violation of statutory law in payment of fictitious and fraudulent claims, that their recitals were untrue, and, naturally, that the ostensible payees' endorsements were forgeries.

"A fictitious claim against the government is one preferred against it for supplies said to have been furnished to the government or for services said to have been rendered to it, no part of which said supplies or services were in fact supplied or rendered. A fraudulent claim against the government is a false or fictitious claim gotten up or contrived by some person or persons with a design or purpose to deceive or defraud the government." *Bridgeman* v. *United States*, 140 F. 577, 594.

Compare *Bayne* v. *United States*, 93 U. S. 642.

It stands admitted that it was not the false payees' endorsements but the false checks themselves and their false recitals which exposed them; the forgeries could have gone on endlessly unexposed since they affected no rightful payee.

Now, six years after the payment of the first of the 144 checks, and four years after payment of the last, the Government seeks to get back, with interest, the money that it lost through the fraudulency of the checks and which petitioner in misreliance upon the integrity of the checks, collected and remitted to The Anacostia Bank.

In *Walker* v. *United States*, 139 F. 409, 413, it was said:

"The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against a citizen, the court has authority, and it is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject * * * in like subject matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of that authority, may in a proper case work an estoppel against the government. The principle that the sovereign is bound by his own acts, and those of his

> lawfully authorized agents within the purview of that authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case where it invokes judicial action."

And despite the fact that the Government had known since 1938 that the checks were false and contained false recitals, it set them up in the complaint as Simon pure and predicated its right of recovery upon their purity. It is because that predicate is untrue that *Clearfield Trust Company* v. *United States*, ante, is not in point. However, the converse of this ordinarily would be true if the checks had been valid and had lawful payees. This was emphasized by the Court in *United States* v. *Chase National Bank*, ante, thus:

> "If the draft had been a valid instrument, with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake."

But we are dealing here with duplicitas checks, like the one in *United States* v. *Chase National Bank*, ante. Hence:

> "It is nothing to the point that one who pays his genuine check, upon which there has been forged the endorsement of the payee or of some intermediate holder in due course, may in the absence of negligence or estoppel compel repayment by him to whom he paid, no matter how innocent of carelessness or wrongdoing the recipient may have been." *United States* v. *National Exchange Bank of Baltimore*, 1 F. (2) 888, 889, affirmed 270 U. S. 527.

The question presented, therefore, is whether petitioner is morally obligated to refund the money. This involves two factors:

(a) The negligence and guilt of the Government in issuing false checks as genuine ones in contravention of law; and, in contrast,

(b) Petitioner's freedom from negligence, freedom from unjust enrichment, and its complete innocence throughout the years.

Compare *Herrmann* v. *Gleason*, 126 F. (2) 936, 939.

In this connection it will be noted that the 144 checks were not issued by accident and that the Secretary of the Navy realized this in convening a Board of Inquiry which, admittedly, was done for the purpose of "inquiring into the circumstances and the general activities of James H. Foley who defrauded the United States of $18,060.83 and the conditions which made the execution of such fraud possible" (R. 8).

See *Peoples Bank* v. *International Finance Corporation*, 30 F. (2) 46 (certiorari denied, 279 U. S. 858).

Therefore:

> "The principle that forbids the defendant enriching itself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying itself against loss at the expense of an innocent and blameless defendant." Keener (1935) on Quasi Contracts, p. 67.
>
> Compare *Cooke* v. *United States*, 91 U. S. 389.

It cannot be disputed that the checks were issued in contravention of law, nor can it be disputed, for this reason, that they were incapable of true endorsement. It follows, therefore, that when, as here, "the endorsements are of the same sufficiency in law as they would be if all were genuine, the warranty is in accordance with the legal situation * * *." *United States* v. *Guaranty Trust Company*, 69 F. (2) 799, 802.

The Government concedes:

> "* * * If the presenting bank could have obtained a valid title despite the forgeries, there could be no recovery." Government's Brief, p. 17, filed in the Court below.

But in order that an endorsement be effective to give to the holder a legal title, it is not always necessary that it be genuine, for the Negotiable Instruments Law, 28 D. C. Code (1940), s. 124,—*which relates to valid commercial paper*—provides that a forged signature is operative against a party who "is precluded from setting up the forgery." Compare *Public Bank of New York* v. *Burchard*, 135 Minn. 171, 160 N. W. 667.

In *United States* v. *Guaranty Trust Company*, ante, and *United States* v. *Chase National Bank*, ante, the collecting banks were protected against damages although neither could trace title through a valid endorsement.

The checks being false, for which reason the Government cannot be called upon to pay again, it necessarily follows that in exchange for payment, the Government got back the equivalent contemplated by it when it got back, unsullied by the forged endorsements, the false checks it had sponsored.

Keener (1935) on Quasi Contracts, p. 43, says:

> "To entitle the plaintiff, who has paid the money under mistake, to recover the money so paid, he must not only prove that he has paid the money without receiving the equivalent contemplated by him, but he must in addition prove that it is against conscience for the defendant to retain the money so paid."
>
> Compare *The Bank of United States* v. *The Bank of Georgia*, 10 Wheat. 333.

2. In reality, this is an action for money had and received and it is therefore governed by the applicable principles laid down by this Court in the following two cases:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted

to retain it. The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession if he has been able to collect it. * * * In such case the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received." *Atl. Coast Line R. R. Co.* v. *State of Florida*, 295 U. S. 301.

"* * * Since in this type of action the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which according to those standards would deny the right." *Stone* v. *White*, 301 U. S. 532.

Recently, in a kindred case, *United States* v. *First National Bank of Chicago*, 138 F. (2) 681, the Seventh Circuit Court of Appeals said:

"Equitable considerations also dictate that judgment in this case should be for the defendant. Defendant was in no way benefitted by collecting these checks. It retained no part of the proceeds collected from the plaintiff."

Indeed the innocence of a defendant has always been a watchword in this Court.

In *United States* v. *Chase National Bank*, ante, the Court said:

"* * * The record discloses substantial evidence to support the finding necessarily involved that no actual negligence or bad faith, attributable to the defendant, contributed to the success of the forgery."

In *United States* v. *National Exchange Bank of Baltimore*, 270 U. S. 527, the Court said:

"* * * The drawer cannot recover for an overpayment to an innocent payee."

In *United States* v. *Guaranty Trust Company*, ante, the Court said:

> "The evidence consisted of an agreement as to the facts and the canceled check. * * * That each of these banks paid a valuable consideration, received the check in good faith, took it without notice of the forgery or other defect, and was not guilty of fraud or negligence * * *."

In the year 1920 the case of *United States* v. *Chase National Bank*, ante, reached this Court for review on appeal by the United States. Since that litigation arose, as here, out of a false Government check, the decision of that case is pertinent. There, as here:

(a) The check was false; it had been issued in contravention of law and its recitals were untrue.

(b) The check had no rightful payee, consequently it was not susceptible of a true endorsement.

(c) The forged endorsement affected no rightful payee.

(d) The forger was the Government's trusted agent.

(e) The forger had access to the Government's blank checks.

(f) Forgery preceded the forgery of the endorsement.

(g) The same hand that wrote the check forged the endorsement.

(h) The Government's agent cashed the check and got the money.

(i) The false check exposed the forged endorsement, and not vice versa.

(j) The check was not deposited in the mail, or lost.

(k) There the Government's negligence was constructive; here it was palpable.

(l) The action was for money had and received; the false endorsement of a false check was the basis of the suit.

(m) The collecting bank never dealt with the forger or cashed the check for him.

(n) The check reached the hands of the collecting bank for collection.

(o) The collecting bank did not keep the money but turned it over before the fraud was discovered.

(p) The collecting bank's position was changed in reliance upon payment.

(q) The collecting bank was innocent, free of negligence, and was not enriched.

(r) In exchange for payment the Government got back its own false check. It did not have to pay twice.

The case involved a single false Government check. The check itself and the professed payee's name were both forged by a Government clerk who cashed it at the Howard National Bank. But in principle there is no difference between a forged Government check "uttered" and a false Government check "issued" in contravention of law as both are iniquitous and duplicitas. In turn, the Chase National Bank, in ignorance of its falsity and the forged endorsement, presented the check at the Treasury for payment. Upon collecting the check the Chase National Bank credited the proceeds to the account of the Howard National Bank.

In deciding the case this Court did not rule that the money should be refunded; instead, after first adverting to the applicability of the doctrine of *Price* v. *Neal*, 2 Burr. 1354, 1357, the Court addressed itself specifically to the legal

aspects of the forged endorsement, and upon this and other phases of the case ruled—

> (a) "The record discloses substantial evidence to support the finding necessarily involved, that no actual negligence or bad faith, attributable to the defendant, contributed to the success of the forgery."
>
> (b) "If the draft had been a valid instrument with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake."
>
> (c) "In order to recover plaintiff must show that defendant cannot retain the money with good conscience."
>
> (d) "Nobody had a better right to it than the collecting bank."
>
> (e) "He cannot be called upon to pay again, and the collecting bank has not received the proceeds of an instrument to which another held a better title."
>
> (f) "The equities of the drawee who has paid are not superior to those of the innocent collecting bank."

3. The United States Court of Appeals for the District of Columbia relied on *Clearfield Trust Company* v. *United States*, 318 U. S. 363-8, for its ruling (R. 28) that—

> "* * * when it presented the checks for payment with a warranty, express or implied, that the endorsements were in all respects regular, it thereby made itself liable to the drawer or drawee if it afterwards was shown that they were forged. Clearfield Trust Co. *v.* U. S., 318 U. S. 363-8."

But the application of that case to this is not justified as there is not the remotest resemblance in the facts. There the Government was free of negligence, the check was issued conformably to law and it had a rightful owner; here the Government was palpably negligent, the checks

were issued in contravention of law, and they had no rightful owners.

The injustice of the ruling of the United States Court of Appeals in the present case lies in the failure of that Court to distinguish between losses arising out of false Government checks unlawfully issued and losses arising out of valid Government checks lawfully issued. This Court recognized such distinction in *United States* v. *Chase National Bank, ante*, when it said—

> "If the draft had been a valid instrument, with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake."

This distinction was also recognized by District Judge Learned Hand, now Associate Justice, Second Circuit, in his opinion in *United States* v. *Chase National Bank*, 241 F. 535, 538, when he said—

> "* * * Now in the case of a genuine bill stolen and forged, the wrong done the drawee, who pays on the forged endorsement, is only that he must pay again, a wrong which cannot arise when the bill is a forgery."
>
> Compare 31 Harvard Law Rev. 304.

Even if the checks had been valid and lawfully issued, a right of recovery would not be absolute but would be governed by equitable considerations. *Clearfield Trust Company* v. *United States, ante; United States* v. *Guaranty Trust Company, ante; United States* v. *First National Bank of Chicago*, 138 F. (2) 681; and *Ladd & Tilton Bank* v. *United States*, 30 F. (2) 334.

4. An express guaranty made to a drawer-drawee at the time of payment of a valid check, bearing the forged endorsement of a bona fide payee, adds nothing to the common law obligation of the presenter of the check, namely, to

refund the money if it was received in such circumstances that offense would be given to equity and good conscience if permitted to keep it. *Leather Mfgs. Bank* v. *Merchants Bank*, 128 U. S. 26. This is no longer an open Federal question as it was directly raised and deliberately decided in 1934 against the Government as drawer-drawee of a valid Government check. *United States* v. *Guarantee Trust Company*, 293 U. S. 340. There the Court said—

> "The express guaranty of prior endorsements means no more than what is implied by every unrestricted endorsement, namely, that the endorsements were effective to give to the holder a legal title and the right to enforce payment of the check."

Compare *State Planters Bank & Trust Company of Richmond* v. *Fifth-Third Union Trust Company*, 56 Ohio App. 309, 10 N. E. (2) 935.

Moreover, a stream cannot rise higher than its source, and since the checks here were issued in contravention of law, the Government cannot stand on any higher ground than the checks themselves. Therefore it is well settled that when the principal obligation is void for illegality, that infirmity will extend to and vitiate the contract of guaranty and will constitute a defense open to the guarantor in an action on the guaranty itself. *Tandy* v. *Elmore-Cooper Live Stock Commission Company*, 113 Mo. App. 409, 87 S. W. 614; *Johnson* v. *Hallings*, 165 Pa. 498.

The converse of this, of course, would be true only where the guaranty ran to a purchaser or endorsee who bought in reliance thereon for value. *Nelson* v. *Hinchman*, 118 F. 435.

5. The cases of *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302; *Onondaga County Savings Bank* v. *United States*, 64 F. 703; *Farmers State Bank* v. *United States*, 62 F. (2) 178; *Fulton National Bank* v. *United States*, 107 F. (2) 86, and *Washington Loan & Trust*

Company v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2) 59, cannot be regarded as precedents for this case because the position of the defendants in those cases was unlike petitioner's enviable position in this case. In each of those cases suit was brought by the Government against the bank that dealt with the forger and cashed checks for him, thereby negligently aiding the forger in the success of his forgeries. In the Washington Loan & Trust Company case the Trust Company cashed over 700 checks for the forger. Besides, in those cases the defendant banks were unjustly enriched at the expense of the Government because the Government's money went to reimburse the money they had paid the forgers. In those cases, therefore, there were no equities on the side of the defendant banks to which they could cling to justify their retention of the money. In contrast, here, petitioner did not deal with the forger, cashed no checks for him, did not keep the money, was an innocent collecting bank, and stands before the Court confident of its rectitude throughout its dealings with the Government. It occupies precisely the position of the Chase National Bank in 252 U. S. 485.

For the reasons stated, it is most deferentially submitted that there are no equities on the side of the Government, and the judgment of the United States Court of Appeals for the District of Columbia should be reversed and the complaint ordered dismissed.

Respectfully submitted,

GEORGE C. GERTMAN,
American Security Building,
Washington, D. C.
Counsel for Petitioner.